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Before the
Federal Communication Commission

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In the Matter of:

Implementation of Section 3 of the
Cable Television Consumer Protection
and Competition Act of 1992

Tier Buy-Through Prohibitions

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No.
92-262

To the Commission

JOINT COMMENTS

Blade Communications, Inc., Cablevision Industries Corp., Multivision Cable TV Corp., Providence Journal Company^{1/} and Sammons Communications, Inc. (hereinafter "Joint Parties"), by their attorneys, hereby submit their Joint Comments in response to the above-captioned Notice of Proposed Rulemaking. Each of the Joint Parties is an owner and operator of cable television systems and each will be directly affected by the outcome of this proceeding.

SUMMARY AND BACKGROUND

This proceeding illustrates the difficulty which confronts the Commission in implementing many of the various provisions of the 1992 Cable Act. What appears on its face to be a relatively simple and straightforward statutory command becomes more complex when other factors are taken

^{1/} Providence Journal Company conducts its cable television operations through its subsidiaries Colony Communications, Inc. and King Videocable Company.

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into account. As stated in the House Committee Report,^{2/} this provision of the Act "prohibits cable operators from requiring subscribers to purchase any tier of service other than the regulated basic tier before being permitted to purchase programming offered on a per-channel or per-program basis." Additionally, the section "prohibits discrimination between subscribers to the basic service tier and other subscribers with regard to rates charged for programming offered on a per-channel or per-program basis." The provision is not intended to become effective immediately for systems which lack addressability or are subject to other technological limitations. The Commission's Notice recognizes that these requirements and prohibitions will require definition and, accordingly, solicits comments on these and other issues. The Joint Parties urge the Commission to focus on the narrow issue raised by this provision: that basic tier subscribers be afforded direct access to premium channel and pay-per-view programming over a period of time and that they not be economically disadvantaged for choosing to do so. Additionally, the Commission should be sensitive to technological developments as well as separate but interrelated statutory requirements and regulatory proceedings in establishing deadlines for compliance with the buy-through provision.

^{2/} H.R.Rep. No. 628, 102d Cong., 2d Sess. 85 (1992).

TECHNOLOGICAL LIMITATIONS

In its discussion of the technological limitations exception of Section 623(b)(8)(B), the Commission correctly recognizes that current cable technology which enables cable operators to offer discrete and secured packages or channels of programming generally uses either addressable converters or trapping and scrambling techniques. With regard to addressability, it is important for the Commission to keep in mind that addressability has developed primarily since the mid-1980s in an environment in which the majority of systems consisted of a single large basic service tier and a number of individual premium channels. Single channel premiums were, and continue to be, offered individually or a la carte and in combination as a discounted package; subscribers are almost universally required to buy the all-inclusive basic package in order to receive the premium channels.^{3/} Requiring basic as a prerequisite to purchasing premium or pay-per-view services means, in addressable systems, that the basic subscriber will be furnished a converter; it does not, however, mean that the converter is necessary for the reception of basic. Packaging and marketing cable services in this fashion was given greater impetus by the deregulatory

^{3/} Those operators choosing to configure their service offerings in this manner would, of course, be permitted to continue to do so under the 1992 Act.

thrust of the 1984 Cable Act. Prior to deregulation, operators attempting to market cable services whose track record was not yet established and whose costs were expected to increase were forced to do so in a local rate regulation environment which offered no assurance that compensatory rate increases would be forthcoming. The Commission recognized this inherent impediment to the emergence of new cable services and acknowledged that tiered services should develop free of rate regulation.^{4/}

With the advent of rate deregulation, the distinction between basic and tier services, driven largely by regulatory considerations, became much less meaningful. Operators were now able to offer a comprehensive package of cable services augmented by individual premium channels and pay-per-view programming. This in turn fostered the growth of new services as programmers had some assurance that start-up channels would be available to all subscribers on systems which chose to acquire the service.^{5/} The ability of operators to arrange and package programming services is not within their sole discretion; program suppliers are vitally interested in this issue and it is a key element in the negotiation of programming agreements. The lesson of this

^{4/} Community Cable TV, Inc., 95 FCC2d 1204 (1983).

^{5/} Report MM Docket No. 89-600 ("Cable Act Inquiry") 5 FCC Rcd 4962 (1990).

history is that cable distribution technology was driven by programming and marketing decisions and not the reverse.

As characterized by the Commission, the intention of the buy-through provision is to promote the ability of basic only cable subscribers to gain nondiscriminatory access to premium cable service offerings. As systems achieve greater addressability, that result will follow. It is important for the Commission to examine addressability in two contexts - equipment addressability and geographic system addressability. The addressable system configuration which prevails in the industry today - full basic and a number of individual premium channels with no intervening tiers - typically is engineered such that only a limited number of channels are actually addressable. Systems in this category must therefore be considered less than fully addressable due to equipment limitations.^{6/}

Similarly, as systems begin to upgrade and extend the availability of addressable converters, any rules adopted by the Commission should recognize that the system is not fully addressable until the upgrade is complete. Conversely, the operator should not be precluded from implementing new or retiered services as the rebuild proceeds; the operator

^{6/} The statute does not require, and the Joint Parties do not intend, that full addressability means that all subscribers must be provided with addressable equipment if it is not needed for the service package which the individual subscriber has selected.

should not have to forego incremental revenues from new services simply because the system is not yet fully addressable throughout the entire service area.

An interim approach which many operators with nonaddressable or partially addressable systems use in an effort to provide subscribers greater flexibility among basic, tiers and premium channels is through the use of traps; use of this technique, however, creates a number of problems for cable operators.

As a threshold matter, traps, no matter how well designed, inherently have an adverse impact on system technical quality and performance characteristics. Moreover, trap placement in the system's channel lineup is highly important and is a function of the technical design of the system, the number of broadcast signals carried, the number of PG access channel required by the local franchise and the size of the basic service package. The premium services are carried adjacent to the broadcast basic package and are secured by scrambling. A basic subscriber purchasing a premium channel or package is given a descrambler but the tier package is trapped out and therefore unavailable.

The approach described above will work effectively if all of the basic service package and premium channels can be inserted below the trap. If, for example, the system is located in a market with a large number of broadcast signals,

it may not be possible to fit all of these services below the trap. Thus the outcome of the Commission's signal carriage (MM Docket No. 92-259) will directly affect the ability of many systems to use trapping and the requirements of this rulemaking must be taken into account in the Commission's formulation of buy-through rules.

To accommodate a large basic service package it may be necessary for the system to resort to scrambling to create a tier. This results in substantial customer dissatisfaction for consumers who have purchased "cable ready" television receivers with features, for example picture-in-picture, that are impacted by cable technology. For the cable operator scrambling necessitates the effort and expense of installing converters/descramblers and replacing existing ones. Additionally, the Commission will address scrambling and equipment compatibility and charges for subscriber equipment in separate rulemakings. As in the case of broadcast signal carriage, the equipment compatibility proceeding will likewise affect converters, addressability and scrambling. Similarly, the rate regulation rulemaking will impact economic aspects of the deployment of subscriber equipment. The Commission should not adopt requirements regarding buy-through, with attendant implications for equipment investment, which will have to be revisited, and perhaps revised, as a result of subsequent proceedings.

DISCRIMINATION

The second half of the buy-through prohibition bars discrimination between basic subscribers and other subscribers with regard to premium channel and pay-per-view rates. It is important to focus on the limited scope of this prohibition; its only purpose is to ensure that in tiered systems basic only subscribers are offered premium and pay-per-view programming on the same terms and conditions as subscribers who choose one or more tiers in addition to the basic programming.

In particular, the Joint Parties urge the Commission not to equate discrimination in the context of tier buy-through with programming discounts. It is common practice in the cable industry, as indeed with most other products and services, to offer promotions and discounts as inducements and incentives to obtain new subscribers or upgrades from existing subscribers. So long as these marketing efforts are not structured in a way which economically disadvantages basic only subscribers, vis-a-vis other subscribers, they are outside the scope of the buy-through provision and should not be the subject of Commission rules.

CONCLUSION

In summary, the Joint Parties submit that the Commission's implementing rules should be narrowly crafted to

fit the specific limited object of the buy-through provision, should take into account and reconcile other regulatory requirements of the Cable Act such as broadcast signal carriage, equipment compatibility, and rate regulation for equipment and should not disturb existing legitimate discounting and promotional practices in the marketing of cable services.

Respectfully submitted,

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